

Charles Cleary, Jr. (“Cleary”) brings a combined appeal of his sentence and the denial of his petition for post-conviction relief in Warrick Superior Court, arguing that the trial court improperly considered certain aggravating factors and failed to weigh a significant mitigating factor. The State cross-appeals and argues that the trial court improperly reinstated Cleary’s petition for post-conviction relief and that the trial court abused its discretion when it allowed Cleary’s belated notice of appeal. We dismiss Cleary’s appeal from the denial of his petition for post-conviction relief and affirm his sentence.

Facts and Procedural History

In 1992, then-sixteen-year-old Cleary pleaded guilty to the stabbing murder of an elderly neighbor and was sentenced to fifty years. On December 10, 2001, Cleary filed a petition for post-conviction relief under cause number 87D01-0112-PC-117 (“PC-117”). Following an evidentiary hearing, the post-conviction court entered extensive findings of fact and conclusions of law denying the petition on December 3, 2004. Cleary filed a pro se notice of appeal of that denial on January 7, 2005. After the notice of completion of transcript was filed, Cleary failed to file an appellant’s brief or request any extension. Consequently, on June 27, 2005, this court dismissed Cleary’s appeal.

Meanwhile, on February 14, 2005, Cleary also filed a petition for belated notice of appeal from his guilty plea and sentence, which was assigned cause number 87D01-0503-PC-035 (“PC-035”). On June 22, 2005, after being appointed counsel, Cleary filed another motion for leave to file belated appeal. The post-conviction court granted Cleary permission to file a belated appeal on May 23, 2006.

On the same day, the court made the following entry under PC-117:

Court issues entry (to-wit: the Court's order and entry of 12/2/04 denying the Petitioner's Petition for Post-Conviction Relief is expunged; the Court's Findings of Fact and Conclusions of Law and Judgment on Petition for Post-Conviction Relief is entered this date; that Michael C. Keating is appointed to represent the Petitioner on any appeal from the Court's ruling; and that the Petitioner is granted leave to appeal in forma pauperis.

Appellant's App. p. 15. Thereafter, on July 25, 2006, the court made the following entry in the chronological case summaries for both PC-117 and PC-035:

It having been brought to the Court's attention that the Petitioner attempted to file a belated notice of appeal within the time limits permitted, but that through mistake the notice was sent to the wrong office, the Court now orders that the Petitioner's belated notice of appeal be filed as of 6/22/06.

Id. at 7.

Cleary filed both a belated notice of appeal from his 1992 guilty plea and sentence and a notice of appeal from the denial of his petition for post-conviction relief. This court granted his request to consolidate the two appeals on October 25, 2006.

I. Denial of Petition Under Post-Conviction Rule 1

Because we find it dispositive of Cleary's appeal from the denial of his petition for post-conviction relief, we first address an issue raised by the State in its cross-appeal. The State argues that the trial court impermissibly expunged and reentered its 2004 order denying Cleary post-conviction relief. We agree. The trial court's action essentially circumvented our 2005 dismissal of Cleary's appeal.

The "law of the case" doctrine mandates that when an appellate court decides a legal issue, both the trial court and the court on appeal are bound by that determination in any subsequent appeal involving the same case and relevant similar facts. Varner v.

State, 847 N.E.2d 1039, 1043 (Ind. Ct. App. 2006), trans. denied (citing State v. Huffman, 643 N.E.2d 899, 901 (Ind. 1994)). As such, the trial court was without authority to revisit Cleary's post-conviction petition and we dismiss his appeal from its denial.

II. Belated Appeal Under Post-Conviction Rule 2(1)

We turn now to Cleary's belated direct appeal of his sentence. The State argues on cross-appeal that the trial court abused its discretion when it granted Cleary permission to pursue a belated appeal. Cleary pleaded guilty in 1992, but did not file a petition for permission to file a belated notice of appeal until 2005.

On November 9, 2004, our supreme court issued its opinion in Collins v. State, 817 N.E.2d 230, 233 (Ind. 2004), wherein it held that "the proper procedure for an individual who has pled guilty in an open plea to challenge the sentence imposed is to file a direct appeal or, if the time for filing a direct appeal has run, to file an appeal under [Indiana Post-Conviction Rule] 2."

Indiana Post-Conviction Rule 2(1) provides in relevant part:

Where an eligible defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:

- (a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
- (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

Whether a defendant is responsible for the delay is generally a matter for the trial court's discretion. Baysinger v. State, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005), trans. denied. Where, as here, a trial court does not conduct a hearing on a petition for

permission to file a belated notice of appeal, we review a trial court's decision regarding the petition de novo. Perry v. State, 845 N.E.2d 1093, 1095 (Ind. Ct. App. 2006), trans. denied. There are no set standards defining delay or diligence, and each case should be decided on its own facts. Salazar v. State, 854 N.E.2d 1180, 1185 (Ind. Ct. App. 2006).

Factors courts may consider in deciding whether a defendant was without fault in the delay of filing the notice of appeal include the defendant's level of awareness of his or her procedural remedy, age, education, familiarity with the legal system, whether he or she was informed of his or her appellate rights, and whether he or she committed an act or omission that contributed to the delay. Id.

Other factors we have considered recently in deciding whether a trial court properly granted permission to file a belated notice of appeal include whether the defendant made previous efforts to challenge the sentence through other collateral means, and the timing of such efforts in relation to our supreme court's decision in Collins. See e.g., Salazar, 854 N.E.2d at 1186 (concluding that defendant was diligent in filing pro se motion to file belated appeal on January 27, 2005); Cruite v. State, 853 N.E.2d 487, 490-91 (Ind. Ct. App. 2006), trans. denied (concluding that defendant was diligent in requesting permission to file belated appeal where first indication that defendant sought to file belated appeal instead of seeking relief under Post-Conviction Rule 1 was filed on February 14, 2005).

As the State points out, the trial court advised sixteen-year-old Cleary of his right to appeal at sentencing, at which point Cleary's counsel indicated that "[w]e would like the opportunity...to talk to him [about a potential appeal.] Then we'll see." Ex. Vol.,

Joint Ex. 1, p. 91. Indeed, the CCS for CF-135 indicates that a praecipe was filed on December 4, 1992. Appellant’s App. p. 4. However, in its order granting Cleary leave to file a belated notice of appeal, the trial court found that this entry was in error “in that there is no evidence that counsel for the defendant filed a praecipe on behalf of the defendant.” Appellee’s App. p. 12. Also, as addressed above, in 2001, Cleary did seek relief from his sentence, albeit unsuccessfully, under Post-Conviction Rule 1. Finally, we note that Cleary’s initial pro se petition for permission to file a belated notice of appeal was filed just over three months after the Collins opinion was issued. Under these particular circumstances, we conclude that the trial court acted within its discretion when it permitted Cleary to pursue a belated appeal of his sentence.

III. Sentence

We now turn to the merits of Cleary’s direct appeal, in which he contends that the trial court improperly considered aggravating and mitigating circumstances. The trial court found the following aggravating circumstances: 1) Cleary was in need of rehabilitative treatment that can best be provided by commitment to a penal facility; 2) imposition of a reduced sentence would depreciate the seriousness of the crime; and 3) the victim was over age sixty-five. Appellant’s App. p. 41. As mitigating circumstances, the court noted Cleary’s guilty plea. Id. While the court stated that it “appreciate[d]” Cleary’s age, it declined to find it a significant mitigating circumstance. Id. at 41-42.

Cleary argues that his sentence violates the rule announced in Blakely v. Washington, 542 U.S. 296 (2004). Our court is split on the issue of whether Blakely should apply to appellants pursuing belated appeals under Post-Conviction Rule 2.

Compare, e.g., Hull v. State, 839 N.E.2d 1250, 1256 (Ind. Ct. App. 2005), trans. not sought and Sullivan v. State, 836 N.E.2d 1031, 1035 (Ind. Ct. App. 2005), trans. not sought. Our supreme court currently has this issue under review. See Boyle v. State, 851 N.E.2d 996 (Ind. Ct. App. 2006), trans. pending; Gutermuth v State, 848 N.E.2d 716 (Ind. Ct. App. 2006), trans. granted, opinion vacated; Medina v. State, No. 71A03-0604-CR-163 (Ind. Ct. App. Nov. 29, 2006), trans. pending; Moshenak v. State, 851 N.E.2d 339 (Ind. Ct. App. 2006), trans. pending.

We need not consider Cleary's Blakely claims because we find his non-Blakely arguments dispositive. See Wright v. State, 688 N.E.2d 224, 226 n.4 (Ind. Ct. App. 1997); Sheron v. State, 682 N.E.2d 552, 553 (Ind. Ct. App. 1997) ("As a matter of jurisprudence, courts will not decide constitutional issues when a case can be decided on other grounds.").

First, Cleary contends that the trial court improperly considered as an aggravating factor that he is in need of correctional and rehabilitative treatment that is best provided by a penal facility. Use of this factor to justify an extended period of incarceration is proper only if the trial court provides a specific or individualized reason as to why this is so, especially if the defendant has not previously been incarcerated for a long period of time. See Hope v. State, 834 N.E.2d 713, 719 (Ind. Ct. App. 2005). The trial court here offered no such individualized explanation; thus its consideration of this aggravator was improper.

As for the "depreciating the seriousness of the crime" aggravator, that factor "may only be used when a trial court is considering imposition of a sentence which was shorter

than the presumptive sentence.” Taylor v. State, 840 N.E.2d 324, 340 (Ind. 2006) (internal citation omitted). Here, there is no indication that the trial court considered a sentence below the presumptive. Thus, the trial court erred when it identified that factor as an aggravator to support the imposition of an enhanced sentence.

Cleary does not contest the trial court’s reliance on the victim’s age as a valid aggravating factor, but he does argue that the trial court improperly failed to consider his age as a significant mitigating factor. The court stated that it appreciated Cleary’s age at the time of the crime, but declined to assign his youth significant mitigating weight. This was within the trial court’s sound discretion. See Sensback v. State, 720 N.E.2d 1160, 1164 (Ind. 1999).

When a court has relied on both valid and invalid aggravators, the standard of review is whether we can say with confidence that, after balancing the valid aggravators and mitigators, the sentence enhancement should be affirmed. See Trusley v. State, 829 N.E.2d 923, 927 (Ind. 2005). Under the facts and circumstances of Cleary’s offense, we can confidently say that the trial court would have imposed an enhanced sentence even without considering the two improper aggravators. Accordingly, we affirm Cleary’s sentence.

Conclusion

We dismiss Cleary’s appeal of the denial of his petition under PCR-1 and affirm his sentence.

Dismissed in part and affirmed in part.

NAJAM, J., and MAY, J., concur.